FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RYMER, Circuit Judge, dissenting:

I would affirm the district court because the complaint alleges that Trustar formed the Plan, helped design the Plan's benefit formula, was a fiduciary with respect to terminating the Plan, gave advice for a fee, had responsibility for proceeding with all necessary measures to ensure the Plan would be terminated and distributions would be made prior to the year ending October 31, 2000, and implemented the decision to terminate the Plan. As the earmarks of an ERISA fiduciary are averred and the discretionary authority to design and implement the Plan and its termination is implicit in the responsibility to "proceed with all necessary measures," the court could conclude that Ron and Sons's state law claims bear on an ERISA-regulated relationship and so are preempted. *See* 29 U.S.C. § 1002(21)(A); *see also, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) (noting that areas with which ERISA is expressly concerned include reporting, disclosure, and fiduciary responsibility) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 & n.19 (1983)); *Rutledge v. Seyfarth, Shaw, and Fairweather*, 201 F.3d 1212, 1219 (9th Cir. 2000) (noting that "a core factor leading to the conclusion that a state law claim is preempted is that the claim bears on an ERISA-regulated relationship");

Arizona State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 721-22 (9th Cir. 1997) (holding that the bank, as a depository and custodial agent of the plan's funds, was not an ERISA fiduciary because it did not "have control respecting the management of the plan or its assets, give investment advice for a fee, or have discretionary responsibility in the administration of the plan"). Even if leave to amend should normally have been allowed, Ron and Sons made no proffer of what an amendment would look like, nor did they explain how new allegations could be crafted that would avoid preemption yet not be inconsistent with allegations in the complaint. In these circumstances, the district court was not obliged to grant leave to amend.[1] Although Ron and Sons contended in moving for reconsideration that the Trustar retainer agreement indicates that Trustar was not an ERISA fiduciary, the court was not required to reconsider its ruling because the agreement was unauthenticated and was neither pled nor appended as an exhibit to the complaint. Finally, Ron and Sons has never indicated any intention to amend to state an ERISA claim. Accordingly, I cannot say that the court abused its discretion in dismissing the complaint.

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[1] Although the procedural posture of the case is peculiar, the question for us now is whether there is any way a claim for relief can be stated. *See Wong v. Bell*, 642 F.2d 359, 362 (9th Cir. 1981) (holding that even where the court failed to give notice of its sua sponte intention to dismiss the complaint, "the dismissal may properly be affirmed . . . [if] Plaintiffs cannot possibly win relief under the statute they have urged").